IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS, Judge of the United States District Court for the Northern District of California,

Petitioner,

vs.

LOUIS NELSON, Warden,

Respondent.

REPLY BRIEF FOR PETITIONER

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Opinion Below

The opinion of the Court of Appeals is reported at 378 F.2d 141. (A. 40)

Jurisdiction

This Court has jurisdiction under 28 U.S.C. §1254(a), having issued a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this matter on June 17, 1968.

Statutes and Rules Involved

See Brief for Petitioner, pp. 2-4.

Question Presented

Is a United States district court judge without jurisdiction to order discovery by way of written interrogatories in habeas corpus proceedings?

ARGUMENT

In the interests of clarity, Petitioner will reply to Respondent's arguments in the order in which they appear in Respondent's brief (hereafter "Resp. Brief").

I.

Petitioner Has Not Raised Any Question Which Was Not Raised in the Court of Appeals or the Petition for Certiorari. (Resp. Brief, pp. 14-17)

Respondent criticizes Petitioner's citation of 28 U.S.C. §2243 and this Court's decisions in *Brown* v. *Allen*, 344 U.S. 443 (1953) and *Townsend* v. *Sain*, 372 U.S. 293 (1963); of certain federal cases concerned with powers of the district courts inherent in their duty to effect the ends of justice; and of 28 U.S.C. §1651(a) (the All Writs Statute) as raising "questions" and "issues" not raised before the Court of Appeals below or in Petitioner's certiorari petition.

The *only* "issue" or "question" raised and discussed in Petitioner's opening brief (hereafter "Pet. Brief") is set forth at page 4 of that brief: "Is a United States district court judge without jurisdiction to order discovery by way of written interrogatories in habeas corpus proceedings?"

This was precisely the question raised in the Court of Appeals by Respondent's application for a writ of prohibition (R. 1)[1]—a writ which could issue only if Judge Harris was without any jurisdiction to make the order which he made. (A. 39); 2 T. Spelling, *Extraordinary Relief*, 1396 (1893); J. High, *Extraordinary Legal Remedies*, 705-6 (3rd Ed. 1896). It is *verbatim* the question presented to this Court in Petitioner's certiorari petition. And it is almost identical in language and certainly identical in substance to the question which is raised and discussed in Respondent's brief. (Resp. Brief, p. 2)

To the extent that Petitioner's authorities can be said to raise any different "question" at all it would simply be the more specific "question" of whether the District Court's jurisdiction could be founded upon anything besides the Federal Rules of Civil Procedure. This "question" is manifestly a "subsidiary question fairly comprised in" the more general question as to whether such jurisdiction existed at all. As such, it did not need to be separately set forth in the certiorari petition (Rule 23(1)(c), U.S. Sup.Ct. Rules). The fact is, however, that the question of whether the District Court's order could be sustained on grounds other than the Federal Rules of Civil Procedure was set forth and discussed explicitly in the Court of Appeals below by both Respondent and Petitioner. Respondent's (Petitioner below) own supplemental brief in the Circuit Court is divided into two arguments: first, that the Federal Rules of Civil Procedure do not apply to habeas

[1] Respondent also erroneously applied for a writ of mandamus in the alternative—erroneously because Respondent sought a negative command while mandamus must be positive in its commands. See 2 T. Spelling, *Extraordinary Relief*, 1396 (1893).

corpus, and second, that *no other authority* supports the use of discovery in habeas corpus.[2]

Thus, even if Respondent were correct (which he is not) in arguing that new authorities cannot be raised on appeal, Respondent's own sweeping discussion of "all authorities" other than the Federal Rules of Civil Procedure makes the argument academic in this case.

Nor did Petitioner confine himself to a discussion of the Federal Rules of Civil Procedure in the Court of Appeals. He specifically discussed the power of the District Court inherent in its duty to do justice in Walker's case (see Supplemental Brief for Respondent below, pp. 4-8 [R. 29]), and all of the authorities about which Respondent complains in this First section may be considered statutory and decisional expressions of that power. Petitioner cited those very same authorities (except the All Writs Statute) in his certiorari petition. Thus, Petitioner has raised no questions or issues which he did not raise in the Court of Appeals below and in the certiorari petition.

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[2] The State's brief reads in part as follows:

"II. FEDERAL PRACTICE DOES NOT PERMIT DISCOVERY IN HABEAS CORPUS PROCEEDINGS.

The exact federal practice in regard to procedure in habeas corpus cases is not clear. *Examination of all authorities on the subject has failed to disclose any case wherein discovery has been allowed in habeas corpus* (with the exception of the recent, and erroneous, *Gladden* and *Schiebelhut* cases, both of which relied on the Federal Rules). The silence of *all authorities* would suggest that it is not the practice, and never has been the practice, to allow discovery in habeas corpus proceedings." (Emphasis added.) (Supplemental Brief for Petitioner [Respondent herein] p. 10) (R. 29)

Petitioner has cited to this Court authorities not cited in the Court of Appeals and, in the instance of the All Writs Statute, not cited in the certiorari petition, in response to Respondent's argument, repeated in his brief (pp. 32-33), that a federal district court judge sitting in habeas corpus has no powers besides those flowing from federal statutes. But there is nothing in this Court's rules or decisions which suggest that the Court is or should be limited in deciding the cases before it to the *authorities* advanced in the Courts of Appeals or the certiorari petition. Certainly the cases cited by Respondent do not support such a proposition. They simply hold that the Court will ordinarily decline to consider an attack on a trial court ruling or order where that ruling or order had not been attacked in the Court of Appeals, *Lawn* v. *United States,* 355 U.S. 339 (1958); *Duignan* v. *United States,* 274 U.S. 195 (1927) or in the certiorari petition, *Lawn* v. *United States, supra; Irvine* v. *California,* 347 U.S. 128 (1954) and will ordinarily decline to consider an attack on a Court of Appeals determination not attacked in the certiorari petition. *Namet* v. *United States,* 373 U.S. 179 (1963); *Phillips Chem. Co.* v. *Dumas Independent School Dist.,* 361 U.S. 376 (1960); *Local 1976, U.B.C.&J.* v. *NLRB,* 357 U.S. 93 (1958); *Neely* v. *Ebing Constr. Co.,* 386 U.S. 317 (1967). They have no application where, as here, the proceedings in both this Court and the Court of Appeals have been concerned with only *one* trial court order (the order compelling Respondent to answer discovery interrogatories) and where, as here, the *only* determination of the Court of Appeals which Petitioner attacks is the one he stated in his certiorari petition that he would attack (the determination that the trial court was without jurisdiction to make such an order).

Respondent has informed Petitioner that in a forthcoming supplemental brief[5] Respondent will concede that he was in error in contending that inherent power authori-

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[5] The State's forthcoming supplemental brief stems from its erroneous assertion that inherent powers authorities were not raised below. The State's first error occurred in its certiorari response where it stated that the inherent power "issue" "was not broached by either party" in the Court of Appeals. (Resp. Cert. Brief, p. 25). Petitioner replied to this error in a certiorari reply memorandum, filed April 10, 1968, attaching copies of those pages of his Appellate Court brief in which inherent powers authorities were set forth. After certiorari was granted, however, the State asserted once again in its brief that no authorities other than the Federal Rules of Civil Procedure had been cited to the Circuit Court below.

Counsel for Petitioner called the error to the attention of the State's counsel and shortly thereafter received a copy of a letter written by the State and addressed (but not, it was later revealed, mailed) to the Clerk of the Court which stated that Petitioner "did indeed claim that the District Court had 'inherent power' to order discovery", and that "insofar as that single issue is concerned, then, we concede that it was raised in the Court of Appeal."

Still later, however, counsel for Petitioner was asked by the State to disregard this letter, and instead was sent a copy of a second letter also written by the State and sent to the Clerk of the Court. In this second letter, the State conceded that inherent powers authorities were raised in the Court of Appeal, but contended that they should now be disregarded because "the District Court did not purport to invoke it in issuing its order."

The State next informed counsel for Petitioner that the information set forth in this second letter will be presented in a supplemental brief. It is in reliance on the second letter, then, that Petitioner replies above to what he is told will appear in the new brief.

Finally, the State contends that it did not receive a copy of Petitioner's certiorari reply memorandum, in which the State's first error was pointed out. A copy of this reply memorandum was served by mail upon the State as attested by counsel's affidavit of service attached thereto. Whether the State received it, however is largely immaterial on this point since the appellate briefs containing the discussions of authorities other than the Federal Rules of Civil Procedure are a part of the certified record and have long been in the State's possession.

ties were not raised below, but will argue that such authorities should now be disregarded because the District Court allegedly did not purport to invoke such power in issuing its order.

The District Court's order, however, did not purport either to invoke or limit itself to *any* particular jurisdictional authority—inherent power, the Federal Rules of Civil Procedure, or any other. By its own terms, the order may be sustained on any valid jurisdictional ground. Furthermore, even if the order had been based expressly on one theory or another, it is well established that the parties are not limited on appeal to the same reasons or arguments relied on by the court below. *Brown* v. *Allen*, 344 U.S. 443, 459 (1953); *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937); see also *J. E. Riley Invest. Co.* v. *Comm'r*, 311 U.S. 55, 59 (1940). Moreover, *even if* these authorities had not been raised below, and *even if* they were deemed to constitute separate "issues" rather than theories, this Court has held that it may consider issues not raised below. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 16 (1941); *Mahler* v. *Eby*, 264 U.S. 32, 45 (1924); *United Bhd., C.J.* v. *United States*, 330 U.S. 395, 412 (1947).

II.

Authorization for Discovery Interrogatories Is Provided in the Habeas Corpus Statutory Scheme, in Section 2243 in Particular, and in the Authority of Brown v. Allen and Townsend v. Sain. (Resp. Brief, pp. 18-31)

Respondent argues that neither the purposes of the Habeas Corpus Act, nor the express provisions of Section 2243 of that Act,[4] nor the decisions of this Court contain any authorization for Petitioner Walker's interrogatories. (Resp. Brief, pp. 18-31.)

Respondent begins with the statement that "Section 2243 does not give a district court a carte blanche in habeas corpus proceedings." (Resp. Brief, p. 18.) Petitioner has at no time argued that it does. The question is not whether this provision gives a district court carte blanche, but whether the provision gives the court the authority to permit the use of discovery interrogatories.

The language of the statute commands the district court to "dispose of the matter as law and justice require." Implicit in this provision is the command that the district court take steps to fulfill the statute's broad purpose. The District Court below determined that law and justice require a use of the discovery interrogatories in question. Unless the order is an abuse of the court's discretion, Section 2243 is sound authority for the order.

Respondent does not argue that the order of the court was an abuse of discretion; he contends instead that Peti-

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[4] 28 U.S.C. §2243, which reads in material part as follows: "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

tioner has no authority to exercise any discovery discretion whatsoever. If Respondent's bare assertion that Section 2243 does not give a district court "carte blanche" is applied to bar the present order, it would similarly bar any action taken by a district court pursuant to Section 2243 with the result that the section would be rendered virtually meaningless.

It is to be noted, moreover, that despite its argument against the application of the Federal Rules, Amicus United States has recognized the validity of Section 2243 as authority for a discovery order like the one ordered by Petitioner. In its brief, the United States has stated that

> "we do not wish to be understood to be arguing that the district court may never order discovery in a habeas corpus or Section 2255 proceeding. Indeed, we do not doubt that the statutory command that the court should 'dispose of the matter as law and justice require' (28 U.S.C. 2243) would justify the court, in exceptional circumstances, in ordering discovery in such a proceeding." (Brief for the United States as Amicus Curiae, p. 4.)

Petitioner concurs fully in this conclusion.

A. Section 2246 of the Habeas Corpus Act Does Not Expressly or Implicitly Deal With Discovery Interrogatories, and Thus Does Not Prohibit Their Use. (Resp. Brief, pp. 19-22)

Respondent contends that 28 U.S.C. §2246 contains an implied prohibition of the use of discovery interrogatories. Section 2246 provides a specific and limited procedure for obtaining evidence by deposition and affidavit. The statute does not address itself to discovery techniques of any kind,

much less does it purport to "regulate" the use of interrogatories in habeas corpus generally. Insofar as interrogatories are concerned, Section 2246 simply provides that they may be propounded in habeas corpus proceedings to all affiants of affidavits, whether or not they are parties (as would otherwise be required by Rule 33). In this regard, the statute actually *extends* the use of interrogatories to a situation where Rule 33 would not insure their use.

Nor do the "comments of those persons who wrote Section 2246" (Resp. Brief, p. 19) support Respondent's contention. On the contrary, the remarks of Senator Alexander Wiley and Judge John J. Parker, cited by Respondent (Resp. Brief, p. 19), demonstrate that the provision was enacted to "regulate" the use of *affidavits*, not interrogatories. The remarks of Judge Clarence Galston and Mr. George Longsdorf, cited by Respondent, establish that the passage of the provision mentioning the use of *depositions* was concerned with regulating procedures for "taking evidence" and not with regulating discovery procedures. Nothing in these remarks—or in the language of Section 2246—lends any support whatsoever to Respondent's contention that the provision requires all uses of interrogatories to be "limited to evidentiary purposes." To read such a remote prohibition into the silence of Section 2246 would be contrary to fundamental rules of statutory interpretation.

B. Congressional Authorization for Discovery in Habeas Corpus Proceedings Presently Exists. (Resp. Brief, pp. 22-23, 30-31)[5]

Respondent argues that discovery interrogatories are such an innovation that they should not be used in habeas

[5] Part B (p. 22) and Part E (p. 30) of Respondent's brief both deal with the same point, and are treated together here.

corpus proceedings without "special congressional authorization". Respondent fails to recognize that congressional authorization already exists in Section 2243 (see Pet. Brief, pp. 8-12); in Section 1651(a), the All Writs Act (see Pet. Brief, pp. 18-22; *infra*, pp. 30-32); in congressional approval of the Federal Rules of Civil Procedure (see Pet. Brief, pp. 23-35; *infra*, pp. 32-44); and in the purposes behind the habeas corpus statutory scheme as interpreted by the Court in *Brown* v. *Allen, supra,* and *Townsend* v. *Sain, supra.* There is no reason to ask for further authority.

In support of his position that there is no congressional authorization for Petitioner's use of discovery interrogatories, Respondent cites Section 2246 and *Miner* v. *Atlass,* 363 U.S. 641 (1960). As has just been pointed out, Section 2246 is irrelevant to discovery interrogatories. *Miner* v. *Atlass* was a case where there was not only a total absence of "congressional authorization" for the use of a particular discovery technique (depositions) in a particular proceeding (admiralty), but where there was express legislative history which established a congressional intent to withhold such authorization. These legal and factual circumstances are totally distinguishable from the present case. (See Pet. Brief, pp. 15-18.)

C. The Decisions of This Court Provide the District Courts With the Authority to Use Discovery Interrogatories in Habeas Corpus Proceedings. (Resp. Brief, pp. 24, 25)

Respondent objects to Petitioner's citation of *Brown* v. *Allen, supra,* and *Townsend* v. *Sain, supra,* as authority for the use of discovery interrogatories in habeas corpus. Respondent contends that footnote 19 of *Brown* v. *Allen* is small support for such discovery since discovery was sup-

posedly not "at issue" in the case. A reading of the context in which footnote 19 appears, however, reveals that the availability of discovery was an integral part of the Court's holding.

Brown v. *Allen* affirmed the authority of the district court to inquire anew into the factual basis for a prisoner's detention where his petition set forth a prima facie case for relief. In determining whether to hold such an inquiry, the Court stated that the district court should examine the record with care. (344 U.S. at 464.) Footnote 19 then provides in detail the various means for securing and completing the record, including discovery. The footnote thus contains not an unconsidered "passing reference" to discovery as Respondent contends, but an explicit procedure crucial to the district court's ultimate trial responsibility.

The powers of inquiry found to be permissible in *Brown* v. *Allen* were in large part made mandatory in *Townsend* v. *Sain*. The authorization for discovery in *Brown* v. *Allen* —both express in footnote 19 and implied from the direction of the decision—are thus underscored in *Townsend* v. *Sain*. The plenary power afforded the district courts in *Townsend's* command to "take testimony and determine the facts *de novo*" (372 U.S. at 311) must include the power to take discretionary steps to that end. (See Pet. Brief, pp. 8-12)

D. Discovery Is Essential to the Fact-Finding Process, and Will Not Burden the Parties or Defeat the Summary Provisions of the Habeas Corpus Act. (Resp. Brief, pp. 25-30)

In this section of his brief, Respondent makes a number of assertions which boil down to two basic contentions—namely, that (1) discovery cannot contribute to the fact-

finding process because the habeas corpus statutory scheme requires the facts to be known when the petition is filed; and (2) even if discovery could theoretically contribute to the fact-finding process, in practice discovery would be too burdensome to permit its use. Neither argument is supportable.

Respondent contends that the Habeas Corpus Act presently requires a petitioner to allege all the facts essential to his case before his petition may be filed. Indeed, says Respondent, a petition filed without such first-hand knowledge is in violation of the verification requirements of Section 2242. (Resp. Brief, pp. 26, 27) The discovery or development of any facts material to Petitioner's case therefore is said to be unnecessary, and would amount only to "fishing expeditions" in support of "speculation" by the Petitioner concerning the basis of his detention. Respondent thus labels the argument that discovery would contribute to the resolution of factual issues as "an astounding and self-contradictory paradox [sic]." (Resp. Brief, pp. 25-26, 27)

It should be obvious that the "speculation" which discovery would avoid is not the speculation of a prisoner concerning the grounds for his detention, but the speculation which the court must engage in when it is forced to resolve issues of fact without having all the material evidence before it. It is precisely such speculation, or litigation "in the dark", which discovery properly eliminates, as this Court and other authorities have long recognized. *Hickman* v. *Taylor*, 329 U.S. 495 (1947);* Moore and Garfinkel, 4 *Moore's Federal Practice*, 1031-1036 (2nd ed. 1966).

* "The new rules . . . restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of

Respondent's suggestion that a petitioner must state in his application all the evidentiary and ultimate facts on which his habeas corpus claim is based is totally unsupportable. The provisions of the Habeas Corpus Act clearly contemplate the likelihood that issues of fact may be developed after the filing of the petitioner's application. Section 2242 provides for amending or supplementing a habeas corpus petition during the course of the proceeding.[7] Section 2243 also recognizes that issues of fact may be developed in a habeas corpus proceeding.[8]

This Court has ruled that a petitioner's application need establish only a prima facie case, not set forth every supporting fact to be relied upon at the evidentiary hearing. *Brown* v. *Allen*, 344 U.S. 443, 502 (1953) (concurring opinion of Frankfurter, J., joined by a majority of the Court, and cited by Respondent herein. See Resp. Brief, p. 26). The standards set forth in *Townsend* v. *Sain* also recognize

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discovery now serve (1) as a device, along with the pretrial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." (329 U.S. at 501)

[7] 28 U.S.C. §2242, which provides in material part as follows: "It [petitioner's application] may be amended or supplemented as provided in the rules of procedure applicable to civil actions."

[8] 28 U.S.C. §2243, which provides in material part as follows: "The applicant or person detained may, under oath, deny any of the facts set forth in the return, *or allege any other material facts. The return and all suggestions made against it may be amended, by leave of court, before or after being filed.*" (Emphasis added.) These provisions clearly recognize that the parties are not frozen to the facts alleged in the pleading, but are free to develop them as they are able.

that facts not necessarily known to a petitioner, nor alleged in his application, must be developed and presented at an evidentiary hearing. Such a procedure is thus not only consistent with the statutory scheme of the Habeas Corpus Act, but is positively compelled by it.

Court-sanctioned discovery is not simply a helpful technique in the fact-finding process, however. In some instances, as in the habeas corpus proceeding below, it is absolutely critical. Alfred Walker, the real party in interest, was arrested and his premises searched without an arrest warrant. The arrest and search were therefore constitutional only if the arresting officers had grounds, judged as reasonable men, to believe that a felony was being committed by Walker. The only grounds for such a belief were given to the police by the informant, one Frances Jenkins. No investigation independent of her story was made prior to the arrest and search.* Grounds for the arrest and search, therefore, rested entirely on the informant and on the reasonableness of the arresting officer's reliance upon

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*The information leading to Walker's arrest was obtained through information-gathering activities which were not supervised or independently corroborated in any manner, even though it was clear that a serious risk of misinformation existed. The record established that the informant was known to the police as a narcotics user and marihuana was readily available to her. The record also established from police testimony that the informant was not searched prior to her entering the hotel to make an alleged purchase of marihuana from Walker and obtain information for the arrest. Nor was the informant searched upon her return from the hotel for narcotics or the allegedly marked twenty dollar bill with which she supposedly made her purchase. When the police entered Walker's room and arrested him, they discovered him to be, according to their own testimony, in a state of sound sleep even though he allegedly had sold marihuana to the informant only minutes before. Despite a thorough search of the petitioner, his clothing, his wallet, and the entire room, the police were unable to discover the twenty dollar bill which petitioner allegedly had accepted only minutes before. (See A. 13-15)

the information supplied. The reasonableness of the officer's decision, in turn, depended strictly upon past experience with the informant, and upon the proven reliability (or unreliability) of information provided by her on prior occasions.

At petitioner Walker's preliminary hearing, the Court inquired into the reliability of the informant on the issue of probable cause. The arresting officer, Sergeant Hilliard, testified that during the period of two years prior to the Petitioner's arrest, the informant had been a special agent for the police and had reliably given information which led to "at least" twenty arrests and convictions. (A. 16, including reference to preliminary hearing transcript.) Based on this particular testimony, the Court expressly found that the informant was reliable.[10]

At Walker's trial, however, on the question of reliability Sgt. Hilliard testified only to two—not twenty—occasions on which the informant had given the police allegedly reliable information. (A. 17, including reference to trial transcript.) In one of these two instances, the information obtained by the police led only to an arrest and no convic-

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[10] The transcript read as follows:

> "*The Court:* Well, let me take up your first motion as to the subpoenaing of the witness. My view is that the informant's role in this proceeding today was also to establish reasonable cause for the witness' entry and subsequent arrest and search—
> *Mr. Hooley:* (Defendant Walker's counsel) Well, it also supplied the—
> *The Court:* —after having given the identity (of the informant) and furnished the fact that he (Sgt. Hilliard) had 20 convictions based on past disclosures, which would make her reliable, and the identity was disclosed. So that part is over." (A. 16, 17, including reference to preliminary hearing transcript.)

tion.[11] Thus, in the first of two instances, it appeared that the information given by the informant may have been *unreliable* rather than reliable.

The other instance relied upon by the police[12] may have been equally unreliable—or nonexistent—since the informant has declared under penalty of perjury that she did not furnish the police with such information. (A. 17 See also A. 28, paragraph 5, for declaration of informant.) The informant has also stated under penalty of perjury that she was of the opinion that the only occasion on which she had furnished the police with information prior to Petitioner's arrest was in the case of one Kilbourne York, mentioned above. (A. 17)

It is clear that the informant's reliability is at best gravely in doubt. Petitioner Walker's interrogatories inquire directly into the establishment of the informant's reliability or unreliability. For that reason, they are crucial to the sole issue upon which the habeas corpus proceeding turns. Did the arresting officers truly have twenty prior arrests and convictions on the basis of information supplied by the informant? Did they have only the two prior arrests testified to at trial? Did they in fact have no prior arrests, as testified to by the informant herself? If the police had prior information which they contend was reliable, did they also have prior information which they knew was not? Was the informant reliable one out of two times,

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[11] A Mr. Kilbourne York was arrested for illegal possession of narcotics, but was released when it became known that he had a valid prescription for its use. (A. 17, including reference to trial transcript.)

[12] This case involved one Robert Gibson. (A. 17, including reference to trial transcript.)

one out of ten times, one out of fifty times, or one out of 100 times? If the informant was frequently unreliable on prior occasions, the trial court may well conclude that a police officer with knowledge of such prior unreliability could not have reasonably acted on the sole basis of the informant's story, but would have been expected to seek a warrant, or at least to attempt to verify the informant's story with orthodox investigative procedures.[13] Petitioner Walker's interrogatories are, in short, a method of discovering the objective truth necessary to a resolution of the arrest and search issue.

The interrogatories have another valuable function apart from discovering material information. They also help determine the methods by which facts must be proved at trial. In the present case, they will help determine whether Walker must rely on the testimony of the informant alone, or can rely on the arresting officers as well. Conversely, only with the interrogatory answers will Walker be prepared, if necessary, to impeach the arresting officers or other witnesses for the State. Through advance preparation it will be possible for counsel and the court to avoid confusing and irrelevant testimony and a waste of valuable court calendar time resulting from a needlessly protracted hearing. In addition, if the interrogatory questions are propounded for the first time at the evidentiary hearing, there is a serious risk of inaccurate or incomplete information inherent in the taking of evidence at one particular

[13] Walker's arrest took place in the middle of the day, only a few blocks from the courthouse, where a warrant could easily have been sought and obtained if probable cause existed. See A. 31, and 32 for affidavit of counsel, paragraphs 10, 11, 12 and 13, and see A. 18, 19, 31 and 32 concerning the availability of judicial review of requests for warrants at the time of petitioner Walker's arrest.

sitting rather than over an extended period of time at the witnesses' convenience.[14]

Respondent contends that even if discovery is an appropriate procedure for finding the truth, it is so subject to abuse that it should not be permitted. (Resp. Brief, pp. 27, 28.) Respondent fears the "crafty petitioner" who, armed with the facts through discovery, "could perjure himself with virtual impunity" and thus not only dupe the court, but also "revel" in overburdening the State. (Resp. Brief, p. 28, including Note 4.) In short, Respondent views discovery as a "Pandora's box" which if opened would loose the horrors of perjury, abuse, and burden. (Resp. Brief, p. 28, Note 4.) These horrors are mere hallucinations.

That discovery helps *prevent* perjury rather than foster it is too well-settled for argument. Moore and Garfinkel, 4 *Moore's Federal Practice,* 1034 (1966); Ragland, *Discovery Before Trial,* 124 et seq. (1932); Sunderland, "Theory and Practice of Pretrial Procedure", 36 Mich. L.Rev. 215, 867-869 n. 2 (1937). Such is precisely the case here. The arresting officer has already given conflicting testimony on the alleged number of arrests and convictions supposedly obtained through the informant. Perhaps these discrepancies are the product of poor recollection. Perhaps they are intentional. Whatever the case, without the advance preparation afforded by the interrogatories, there is no reason to believe that the same conflicting or inaccurate testimony will not be repeated.

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[14] For a discussion of the benefits of discovery applicable to the present case, such as avoiding conflicting testimony, avoiding surprise, preventing perjury, economy of the court's time, and finding material facts which cannot otherwise be found, see Moore and Garfinkel, 4 *Moore's Federal Practice,* 1034-1036 (1966).

Respondent's fear that discovery will aid petitioner Walker in committing perjury is groundless for additional reasons. The sole issues in question—the reliability of the informant and the state of mind of the arresting officers—are not issues on which Walker will even testify. While the record reveals discrepancies casting grave doubt on the existence of probable cause, Walker himself has no first-hand knowledge of the story given to the police by the informant either in his case or on prior occasions. Nor does he have knowledge of the mental processes the police used to conclude that they had cause for Walker's arrest. Walker was personally removed from all such pre-arrest activities. He could not perjure himself on these issues even if he were so inclined.

Respondent is also wrong in assuming that there will be other forms of abusive discovery in habeas corpus proceedings. Respondent does not, and cannot, contend that the interrogatories in the instant case are abusive or burdensome. The interrogatories are short, concise, and seek only information which is relevant to the issues to be tried at the evidentiary hearing.

But Respondent contends that in general, discovery will provide a prisoner with "unlimited opportunity to engage in court-sanctioned fishing expeditions". (Resp. Brief, pp. 11, 26-27, and 27 n. 3.) There is no validity whatsoever to the contention that fishing expeditions will be employed, or permitted if they are attempted.[15] The Federal Rules of

[15] This is true wholly aside from the fact that the cry of "fishing expedition" has been all but completely dismissed by the courts as a legitimate objection to discovery. As this Court stated in *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947) ". . . the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve

Civil Procedure have long functioned to afford entirely adequate protection against inappropriate or overly burdensome discovery.[16]

Even if the discovery ordered below were sustained on grounds other than the Federal Rules of Civil Procedure, protection afforded by experience with the rules could likewise be adopted and employed by the court pursuant to its inherent power. Certainly, any authority which permits discovery must include the authority to limit it as well.

There is likewise no merit to Respondent's contention that he will be overburdened with discovery even within the framework of the existing rules. The premises of this contention are that "discovery may be initiated when suit is filed", and that a prisoner can serve interrogatories "even before his petition had been examined by a federal judge and a decision [is] made as to whether to issue an order to show cause." (Resp. Brief, p. 29.) This alleged possibility, coupled with the fact that the vast majority of prisoners proceed *in forma pauperis*, and are thus not restrained by litigation costs, supposedly would burden the State by forcing it to seek protection in otherwise unnecessary court hearings. (Resp. Brief, p. 29.)

A reading of the Habeas Corpus Act and the Federal Rules of Civil Procedure shows that these premises are

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to preclude a party from inquiring into the facts underlying his opponent's case." See also Pike and Willis, "Federal Discovery in Operation", 7 Univ. of Chicago L. Rev. 297, 303 (1940).

[16] See Rule 30(b), Federal Rules of Civil Procedure, which provides in material part as follows: "[T]he court may make any . . . order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." See also Moore and Garfinkel, 4 *Moore's Federal Practice*, 1036-1039, 2023, 2024 (1966) on the adequacy of existing controls on abusive discovery.

wholly inaccurate. Rule 33 of the Federal Rules of Civil Procedure provides that interrogatories may not be served without permission of the court for ten days following the commencement of the action.[17] Section 1915 of Title 28 governing proceedings *in forma pauperis* provides that a *forma pauperis* proceeding *commences* only upon an order of the Court.[18] Thus, a petition which appears to be frivolous or malicious will be initially dismissed by the Court, and the opportunity for discovery will not arise.

Where the Court permits the action to proceed *in forma pauperis* and commences the matter with a show cause order,[19] the opportunity for discovery will not arise prior to another court review of the matter. Section 2243 of Title 28 requires the State's return to be filed within three days after the order to show cause, and the matter to be set for hearing within 5 days after the return. Thus a review of the petition is held within the ten day period preceding any discovery, and the State is not required to request or

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[17] Rule 33, Fed.Civ.P., which provides in material part as follows: "Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained." (Similarly, depositions may not be taken without leave of court for twenty days after commencement of the action. Rule 26, Fed. R. Civ. P.)

[18] 28 U.S.C. Sec. 1915, "Proceedings in forma pauperis," which reads in material part as follows: "(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor."

[19] Since a prisoner's application to proceed *in forma pauperis* and his petition for the writ are submitted together and reviewed simultaneously by the court, the order granting leave to proceed *in forma pauperis* is normally joined with the order to show cause why the writ should not issue.

attend any hearing not already prescribed by law. If the petition is dismissed at this hearing, of course no discovery would ensue. If the writ of habeas corpus is granted, of course no discovery would be necessary. If the court should order an evidentiary hearing or further proceedings, any questions of the need for discovery could be reviewed and appropriate orders entered.

As a practical matter, whether the petition proceeds *in forma pauperis* or otherwise, and even if the action is deemed to commence with the filing of the petition, any party or the court could at any point request a continuance of discovery interrogatories without any burden whatsoever. Rule 30 of the Federal Rules of Civil Procedure permits the court to postpone any discovery until an appropriate stage of the habeas corpus proceeding.[20] Where the State is concerned, such a request would take no more effort than it presently exerts in requesting continuances for the filing of its returns, normally entered as a matter of course. This is not to conclude that discovery techniques should systematically be deferred beyond the 10 or 20 day periods prescribed in the rules. One can easily foresee instances in which the court might desire prompt dis-

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[20] For instance, the court might stay all discovery until counsel is appointed for petitioner, or until an evidentiary hearing on fact issues is ordered, or simply until further leave of court is granted. The appointment of counsel should particularly serve to allay Respondent's fears of needless discovery. Such counsel, both in the interests of his client and as an officer of the court, will not be interested in spending his uncompensated time, or the time and goodwill of the court, with frivolous or abusive discovery. For a brief discussion of proposed stages at which discovery might commence beyond the 10 and 20 day periods provided in Rules 33 and 26, where such delay might be deemed appropriate, see Brief for Respondent (Petitioner herein) filed with the Ninth Circuit Court of Appeals pp. 12-15. (R. 28)

covery in order to grant the speedy relief which the writ is designed to afford, or to obtain a fresh and accurate record, or to preserve evidence. The ease with which discovery can be deferred where appropriate, however, merely points out that the supposed burden upon the State to do so is simply non-existent.[21]

Respondent's assumption that the great majority of prisoners will attempt to use discovery in bad faith is simply unfounded in logic and experience. If prisoners were truly interested only in harassing the State, they could have done so already. Prisoners have long been able to file civil rights actions (42 U.S.C. §1983 et seq.) to which the Federal Rules of Civil Procedure apply, and thereby invoke the spectrum of discovery techniques. The potential for abuse has long existed, yet abuse has not occurred. Perhaps Respondent fails to give sufficient credit to the number of petitioners who seek to vindicate their rights in good faith, even if it is true that most of them ultimately are unsuccessful. In any event, the spectre of abuse is irrelevant since the Federal Rules of Civil Procedure provide completely adequate protections.

Respondent also argues that discovery should not be permitted under any circumstances since it often results in delay, and delay is contrary to the speedy remedy which Section 2243 of the Habeas Corpus Act demands. (Resp. Brief pp. 29, 30.) Petitioner Walker and other prisoners no doubt share Respondent's concern for a speedy hearing, but it should be obvious that any delay occasioned by a petitioner's use of discovery is delay of the petitioner's own

[21] Of course, once discovery is appropriately commenced, Rule 30 continues to afford adequate protection from abuse.

choosing. Only abusive discovery by the State would unfairly prejudice a petitioner's right to the speedy determination required by Section 2243. Certainly, however, Respondent does not mean to suggest that the State would engage in such dilatory tactics.

Finally, Respondent argues that it is incongruous to permit in habeas corpus proceedings the use of civil discovery techniques which are not available to defendants in criminal proceedings. (Resp. Brief, p. 30.) The argument betrays a lack of understanding of the reasons that discovery has until recently[22] been limited in criminal actions, and of the significant differences between the two types of proceedings.

The reasons most commonly advanced for limited discovery are (1) that a guilty defendant will tamper with evidence or intimidate witnesses, and (2) that the defendant might use discovery against the State, yet protect himself from discovery by asserting his right against self-incrimination. See Note, "Civil Discovery In Habeas Corpus", 67 Colum. L.Rev. 1296, 1309 (1967).

In habeas corpus generally, as well as in the proceeding below, the threat of tampering or intimidation is almost non-existent since the petitioner is almost always incarcerated. Moreover, the privilege against self-incrimination is not likely to be involved in habeas corpus since the issue is, as it is in the present case, whether the petitioner's rights were respected and *not* whether he committed the crime for

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[22] Even in criminal proceedings discovery has recently been broadened under the Federal Rules of Criminal Procedure and under the rules of many States. See Louisell, "The Theory of Criminal Discovery and the Practice of Criminal Law", 14 Vand. L.Rev. 921, 938-45 (1961).

which he was convicted. Neither of the reasons which have until recently hampered the beneficial use of discovery in criminal proceedings justify hampering discovery in habeas corpus.

III.

The District Court Has the Inherent Power to Authorize Discovery Interrogatories in a Habeas Corpus Proceeding. (Resp. Brief, pp. 31-39)

Petitioner has cited numerous cases which authorize discovery procedures pursuant to the power of the court inherent in its duty to do justice. (Pet. Brief, pp. 12, 13.) Respondent contends that all these cases were erroneously decided since courts allegedly have no inherent power other than to regulate matters of internal administrative procedure, decorum, and courtroom order.

The inherent power of the courts is not limited to courtroom housekeeping chores. Federal courts have inherent power to take any action reasonably necessary for the administration of justice, so long as the court's action are not contrary to constitutional or statutory provisions. *Ex Parte Peterson,* 253 U.S. 300 (1920); *Reid* v. *Prentice-Hall,* 261 F.2d 700 (6th Cir. 1958); *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U.S. 134 (1919); *Refior* v. *Lansing Dropforge Co.,* 124 F.2d 440 (6th Cir. 1942), *cert. denied* 316 U.S. 671 (1942); and *Ex Parte United States,* 101 F.2d 870 (7th Cir. 1939).

In *Ex Parte Peterson,* 253 U.S. 300 (1920), the question presented was whether the district court had the inherent power to appoint an auditor to inquire into certain books

of account and report to the court on his findings (an activity, it should be noted, not wholly unlike discovery). This court affirmed the district court's power to do so as follows:

> "There being no constitutional obstacle to the appointment of an auditor in aid of jury trials, it remains to consider whether Congress has conferred upon district courts power to make the order. There is here, unlike Ex parte Fiske, 113 U.S. 713, no legislation of Congress which directly or by implication forbids the court to provide for such preliminary hearing and report. But, on the other hand, there is no statute which expressly authorizes it. *The question presented is, therefore, whether the court possesses the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.*
>
> *Courts have (at least, in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.* Compare Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80, 87-90, 6 Mor.Min. Rep. 317. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause." (253 U.S. at 312. Emphasis added.)

Respondent cites *Cary* v. *Curtis,* 44 U.S. (3 How.) 236, 244-45 (1845) as contrary authority. There the court's task was to construe an Act of Congress which purported to make any remedy for overcollection of duties run exclusively against the Treasury and not, as the practice had

been prior to the Act, against the collector as well. The plaintiffs argued that Congress could not prohibit a suit against the collector, for to do so would deprive them of a constitutional right to resort to the courts for a remedy. The Court rejected this argument, *inter alia,* on the ground that federal courts had the jurisdiction to entertain only those actions which Congress provided by statute. Unlike courts "existing by prescription or by the common law", they did not have the inherent power to extend their subject matter jurisdiction beyond statutory provisions whose construction deprived the courts of such jurisdiction. *Cary* v. *Curtis,* 44 U.S. (3 How.) 236, 244-246 (1845). It is this language which Respondent cites as authority for the proposition that no inherent power (besides "housekeeping power") exists in the federal courts.

Cary v. *Curtis* does not deny the existence of the courts' inherent powers *per se,* but only the court's power to act outside its statutory jurisdiction or in contradiction to other legislation. Petitioner has no quarrel with this case. Indeed, Petitioner recognizes that in *Ex Parte Peterson* this court expressly stated that a district court's inherent power may be exercised only where there is no constitutional or statutory prohibition to the contrary. As is shown elsewhere, however, (*supra,* pp. 9-10; 12-15) there is no such prohibition in this case.

Respondent also cites *Miner* v. *Atlass,* 363 U.S. 641 (1960) as denying the existence of the courts' inherent power. The court in *Miner* did not deny that district courts may exercise their inherent power under appropriate circumstances; the court merely found that a blanket exclusion of discovery techniques in admiralty was set forth in Rule 81(a)(1) of

the Federal Rules of Civil Procedure, as well as in the specific legislative history of the general admiralty rules. Again, however, no such exclusion or legislative history is to be found in the present case. (See Pet. Brief, pp. 16, 17.)

Respondent cites 28 U.S.C. Section 2246 as legislation contravening the court's inherent power, but as Petitioner has already pointed out, Section 2246 does not deal with or preclude discovery expressly or by implication. (See *supra,* pp. 9-10.) On the contrary, the Habeas Corpus Act and decisions interpreting the court's duties under that Act affirmatively command the courts to exercise their inherent powers necessary to fulfill their duties under the Act.[23]

Indeed, in the landmark decision of *Brown* v. *Allen,* (per Frankfurter, J., concurring opinion) this Court declared that a district court might appoint counsel for a petitioner pursuant *not* to any express provision in the Habeas Corpus Act (there is none), but pursuant to the court's "inherent authority", citing *Ex Parte Peterson.*[24] If the district court is able (as it has been for years without controversy) to exercise its inherent power to appoint counsel to aid in its

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[23] In addition, as Petitioner has already argued, the Habeas Corpus Act, *Brown* v. *Allen,* and *Townsend* v. *Sain* should be viewed not merely as authority for the exercise of inherent power, but as direct authority for the employment of discovery interrogatories. (See Pet. Brief, pp. 8-12, and see *supra,* pp. 8-9; 10-12)

[24] "Care will naturally be taken that the frequent lack of technical competence of prisoners should not strangle consideration of a valid constitutional claim that is bunglingly presented. District judges have resorted to various procedures to that end. Thus, a lawyer may be appointed, in the exercise of the inherent authority of the District Court (cf., e.g., *Ex parte Peterson,* 253 U.S. 300), either as an amicus or as counsel for the petitioner, to examine the claim and to report, or the judge may dismiss the petition without prejudice." *Brown* v. *Allen,* 344 U.S. 443, 502 (1953).

examination and disposition of a petitioner's claim, there is no reason that it may not similarly aid itself with other procedures, such as discovery interrogatories.

IV.

The "All Writs" Statute Provides a District Court With a Basis for Authorizing Discovery Interrogatories in a Habeas Corpus Proceeding. (Resp. Brief, pp. 39-47)

Respondent contends that the All Writs Statute, 28 U.S.C. §1651(a) would not authorize the District Court to order discovery interrogatories because such an order would not conform to any common law "writ" (Resp. Brief, pp. 39-44), and because no order which is not "within the framework established by Congress to regulate the proceeding in which [the] power is exercised" is authorized by the All Writs Statute (Resp. Brief, pp. 45-47).

Petitioner does not disagree with the proposition that there was no "writ" at common law which was *identical* to the discovery order of the District Court. That is not the point. As Petitioner has pointed out (Pet. Brief, p. 20), this Court has made it clear that the All Writs Statute is not "an ossification of the practice and procedure of more than a century and a half ago" but is instead "a legislatively approved source of procedural instruments designed to achieve the 'rational ends of law.'" *Price* v. *Johnston*, 334 U.S. 266 (1948). As Petitioner's brief also demonstrated, the order in question here bears at least as strong a resemblance to the common law writs of subpoena duces tecum and subpoena ad testificandum, or at least the modern form of those writs, as the order in *Price* v. *Johns-*

ton releasing a prisoner to argue his case bore to any common law writ (Pet. Brief, pp. 21-22). Petitioner pointed out that these subpoena powers had been used by the Courts of Appeals to compel discovery of information at a limited hearing prior to hearings on the merits, *Bethlehem Shipbuilding Corp.* v. *N.L.R.B.*, 120 F.2d 126 (1st Cir. 1941); *Olson Rug Co.* v. *N.L.R.B.*, 291 F.2d 655 (7th Cir. 1961) and that this Court itself in *Brown* v. *Allen*, 344 U.S. 443, 464, n. 19 (1953) had approved such a procedure.[25] Petitioner further pointed out that the order of the District Court was essentially a streamlined and economic form of exercise of the subpoena powers for discovery purposes—one which would eliminate the burdens of a double hearing. After *Price* v. *Johnston, supra*, it is certainly no answer to this argument to say that the discovery order at issue here is not precisely identical in form to common law subpoenas.

Respondent's contention that the All Writs Statute authorizes only such orders as are "within the framework established by Congress to regulate the proceeding in which [the] power is exercised" is likewise nothing more than shadow-boxing. Petitioner readily concedes that "[w]here the statutes establish procedures or limit their application, a court cannot issue a writ [under the All Writs Statute] whose only effect would be to avoid those conditions and thwart the congressional policy." (Resp. Brief, p. 46) If this were a case like *Miner* v. *Atlass*, 363 U.S. 641 (1960), relied on by Respondent (Resp. Brief, p. 47) where the petitioner was attempting to employ discovery in proceedings in which Congress had directed that discovery was not to be used, Petitioner would admit that the All Writs Stat-

[25] Respondent concedes that these subpoena powers have been so employed. (Resp. Brief, pp. 42, 43, nn. 13, 14.)

ute would furnish no excuse for contravening the congressional will. Similarly, if this were a case like *Brown* v. *Allen*, 344 U.S. 443 (1953), *Holiday* v. *Johnston*, 313 U.S. 342 (1941) or *Walker* v. *Johnston*, 312 U.S. 275 (1941), the other cases relied on by Respondent (Resp. Brief, p. 46), involving contentions that a district court may act in square violation of express provisions of the Habeas Corpus Act, Petitioner would be the first to concede that the All Writs Statute could not sanction such procedure. However, there is no comparable expression of congressional will involved in this case. Respondent's suggestion that such an expression of congressional will with respect to the use of discovery interrogatories in habeas corpus may be found in Section 2246, in Civil Rule 81(a)(2) or in Note 5 to Criminal Rule 54(b)(5) is shown elsewhere in this brief to be completely without foundation. (See discussion of Section 2246 at pp. 9-10, *supra* and of Civil Rule 81(a)(2) and Note 5 to Criminal Rule 54(b)(5) at pp. 32-44, *infra*.)

V.

The Discovery Interrogatory Provisions of the Federal Rules of Civil Procedure Apply to Habeas Corpus Proceedings. (Resp. Brief, pp. 48-73)

Respondent contends at one and the same time that the Federal Rules of Civil Procedure do not authorize the use of discovery interrogatories in habeas corpus proceedings because "the Federal Rules were not extended to habeas corpus" (Resp. Brief, p. 55; pp. 54-57 generally), and because such interrogatories do not meet explicit statutory standards set forth in Rule 81(a)(2) which govern the applicability of the Rules in habeas corpus. In other words,

Respondent says that none of the Federal Rules apply, then says that some apply, but not those pertaining to interrogatories. This obvious inconsistency aside, Respondent is wrong in both contentions.

A. Respondent Is Incorrect in Arguing That the Civil Rules Are Totally Inapplicable to Habeas Corpus (Resp. Brief, pp. 52-58)

This "total inapplicability" position was taken by Respondent in his Response to the certiorari petition. As Petitioner pointed out in his opening brief, it is flatly contradicted by the language of the very provision upon which Respondent relies—Rule 81(a). It is belied by the language of Rule 81(a)(2) which in both its original and its amended forms explicitly declares that the Rules *are* applicable to habeas corpus "to the extent" that certain conditions exist. And it is belied by Rule 81(a)(1) which sets forth a blanket rule of exclusion for admiralty proceedings (and prize proceedings), but does *not* do so for habeas corpus proceedings. In short, while Respondent is correct in suggesting that Rule 81(a) is not a model of clarity in draftsmanship (Resp. Brief, pp. 49-51), the provision clearly does *not* exclude the Rules altogether from habeas corpus proceedings.

Nor does the legislative history of Rule 81(a)(2) suggest that a rule of blanket exclusion was intended by its framers. On the contrary, as Petitioner's opening brief pointed out, in the first draft of the Advisory Committee on Rules for Civil Procedure in which habeas corpus was mentioned (draft of February 20, 1937), habeas corpus was to be governed exclusively by existing statutes except for appeals, as to which the Rules would be applicable; how-

ever, this language—which *would* have provided the blanket exclusion for which Respondent contends—was abandoned in favor of the present language of Rule 81(a)(2). Because Respondent has raised some question about the existence of this early draft and because it does so graphically demonstrate that a rule of blanket exclusion was considered *but rejected* by the Advisory Committee, a copy of it is attached to this brief. (See Addendum, pp. 45-48)[26]

Respondent asserts that a contrary intent is evinced by certain remarks of Advisory Committee members William D. Mitchell, Edgar B. Tolman, and Judge Charles E. Clark, made after Rule 81(a)(2) was cast in its final form. This assertion is not borne out, however, by the texts of those remarks. For example, while Respondent is correct in stating that Mr. Tolman testified before the Judiciary Committee of the House of Representatives that "[the Rules] apply to appeals with regard to . . . habeas corpus . . . ,"

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[26] This is a copy of the draft included in papers of the late Prof. Edmund M. Morgan, a member of the Advisory Committee. The handwriting on the draft is apparently Professor Morgan's.

Respondent takes issue with this draft by contending that he "has been unable to establish [its] existence"; that he "suspects" that Petitioner obtained the citation to the draft from a Note written by the Harvard Law Review; and that, although he does not wish to impugn the veracity of the Note or Petitioner's motives, he feels "obligated" to note that he has been unable to examine this "authority" "to which only the Harvard Law Review is privy." (Resp. Brief, p. 58, n. 33)

Petitioner is at a loss to explain these extraordinary allegations. As for Respondent's questioning of the legitimacy of Petitioner's reliance on a published Law Review Note, one can only speculate as to Respondent's methods of doing research. Why Respondent contends that he has been unable to examine the document, or assumes that it is "privy" only to the Harvard Law Review, Petitioner is unable to say. The document exists in the open stacks of the Harvard Law School Library, and is available to any attorney in the United States, including counsel for Respondent, if he had chosen to ask for it.

(Resp. Brief, p. 53), Respondent is incorrect in implying that Mr. Tolman testified that the Rules "did not apply to habeas proceedings" (Resp. Brief, p. 54). Similarly, Petitioner does not quarrel with Respondent's representations that Mr. Mitchell advised the bar at various symposia conducted by the Institute on the Federal Rules of Civil Procedure in 1938 that the "rules" do not apply in habeas corpus except on appeals;[27] Mr. Mitchell's advice was accurate: Rule 81(a)(2) makes clear that except as to appeals the Rules *as a whole* do not apply in habeas corpus proceedings. But those remarks do not mean that Mr. Mitchell or any other member of the Advisory Committee felt that Rule 81(a)(2) rendered *each individual rule* inapplicable to habeas corpus. Certainly Judge Clark's reference in *United States ex rel. Jelic* v. *District Director of Immigration,* 106 F.2d 14, 20 (2d Cir. 1939) to the "limited application" of the Rules to habeas corpus cannot sustain such a conclusion.

Nor do the 1938 discussions by "contemporary practitioners" cited by Respondent support such a conclusion. (Resp. Brief, pp. 55-56) Respondent's quotation from an article in 4 John Marshall L. Q. 291, 293 (1938-39) merely states that "Rule 81 makes specific mention of a good many special actions which are governed in whole or in part by special statutory provisions and to which these rules do not apply *except to the extent stated* in Rule 81" (emphasis

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[27] Such a remark does not appear, however, at ABA, PROCEEDINGS OF THE INSTITUTE ON THE FEDERAL RULES OF CIVIL PROCEDURE AT WASHINGTON, D.C., AND OF THE SYMPOSIUM AT NEW YORK CITY, 187 (1938), one of Respondent's citations to that effect. (Resp. Brief, p. 53)

added); it does not state that Rule 81 operates to render each of the Rules inapplicable in habeas corpus. The article from 23 Marquette Law Review 159, (1938), cited by Respondent (Resp. Brief, p. 56) did not state that "The exceptions mentioned in this rule [Rule 1] refer to certain proceedings named in Rule 81, such as bankruptcy, admiralty, citizenship, deportation and others [*including habeas corpus*], to which the new rules do not apply" (emphasis added); the bracketed language has been added by Respondent. But even if that passage had been written in the manner in which it appears in Respondent's brief, it, and the other passage to which Respondent refers, would do nothing more than indicate that "contemporary practitioners" understood that Rule 81(a)(2) meant that the Rules *in their entirety* were not applicable to habeas corpus —a proposition with which, as stated above, Petitioner does not quarrel. In sum, there is no "genealogy" of Rule 81 (a)(2) which would or could justify emasculating its language in the fashion suggested by Respondent.

Nor is there any other authority for doing so. The text of Note 5 of the Advisory Committee on the Federal Rules of Criminal Procedure to Criminal Rule 54(b)(5) (Resp. Brief, pp. 56-57), which does not mention the Federal Rules of Civil Procedure at all, itself refutes Respondent's contention that it "observed that the Federal Rules of Civil Procedure do not apply to habeas corpus cases." (Resp. Brief, p. 56) In the only other authority for such a reading of Rule 81(a)(2) suggested by Respondent, *Holiday* v. *Johnston*, 313 U.S. 342 (1941), the issue was whether Rule 53 of the Federal Rules of Civil Procedure (providing for reference to a master) was applicable in habeas corpus despite

its *inconsistency* with procedures prescribed in the Habeas Corpus Act. The holding of this Court that Rule 53 was inapplicable, and the passage from its holding cited by Respondent (Resp. Brief, p. 57), did nothing more than confirm that Rule 81(a)(2) preserved the statutory provisions touching habeas corpus procedure which existed when the Rules were enacted, and provided that the Rules should not be applicable insofar as they conflicted with such provisions. The Court did *not,* as Respondent suggests, hold those prior provisions "to be the *exclusive* procedure to be followed." (Resp. Brief, p. 56)[28] Neither this Court nor any other federal court, to Petitioner's knowledge, has ever rendered such a holding. Indeed, as Petitioner's opening brief points out, such a holding would conflict with twenty federal decisions from five circuits spanning two decades. (Pet. Brief, pp. 23, 24, 28).

B. Respondent Is Incorrect in Arguing That Rule 33 Does Not Conform to the Requirements of Rule 81(a)(2) (Resp. Brief, pp. 59-73)

Respondent also contends that Petitioner's use of written interrogatories is barred by Rule 81(a)(2) because of an alleged failure to meet that Rule's "first criterion" (that the Rule sought to be employed is not contrary to habeas corpus practice set forth in other federal statutes) and its "second criterion" (that the practice of Rules conform to habeas corpus practice prior to 1938).

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[28] Such a holding would have made no sense because there were very few provisions in Title 28 concerning habeas corpus procedure. The procedural scheme in Title 28 for habeas corpus was—and still is—skeletal.

As for the first criterion, Respondent contends that "the use of . . . interrogatories in habeas is already regulated by statute and limited to evidentiary purposes." (Resp. Brief, p. 59). Respondent, however, fails to cite any federal statute in which the use of interrogatories is in fact so regulated or limited. Certainly 28 U.S.C. §2246 is not such a statute, as demonstrated above. (See *supra*, pp. 9-10). Section 2242 of Title 28 is also said by Respondent to have a limiting effect because it "plainly requires the petitioner to know and allege the facts. This leaves no room for discovery." (Resp. Brief, p. 60). The complete answer to this fallacious interpretation has also been set forth above. (See *supra*, pp. 14-15). In short, there is nothing in the "first criterion" of Rule 81(a)(2) to preclude Petitioner's use of interrogatories.

Nor is there any such ban in the second criterion of Rule 81(a)(2). Respondent's interpretation of that criterion—that Petitioner must show that "prior to the adoption of the Federal Rules in 1938, [1] interrogatories were used for discovery in civil actions and [2] that the practice in habeas corpus proceedings conformed thereto" (Resp. Brief, p. 60. Brackets added)—would not lead to a contrary conclusion.

There can be no doubt that the first part of this second criterion is satisfied. Respondent's lengthy discussion (Resp. Brief, pp. 62-68) of the discovery techniques available in civil actions prior to 1938 itself demonstrates that while there was little federal authority for discovery *depositions* prior to enactment of the Rules, Equity Rule 58, adopted in 1912, explicitly provided for the type of discovery which Petitioner seeks here, namely, discovery interrogatories. (Resp. Brief, p. 67). Thus, to borrow Re-

spondent's own words, "prior to the adoption of the Federal Rules in 1938, interrogatories *were* used for discovery in civil actions." (Resp. Brief, p. 60).

As for the latter part of the second criterion, Petitioner's opening brief pointed out (Pet. Brief, p. 34) that trials of fact by the court were an established part of habeas corpus as well as ordinarily civil proceedings so that the "practice" or general format of habeas corpus did conform to the "practice" in other pre-1938 civil proceedings involving non-jury trials of fact. Under the "second criterion", the Rules are excluded only "to the extent that" they are not suitable for this common format or practice. Since discovery interrogatories are suitable, they are not excluded.

Respondent's argument that the second criterion is not satisfied in this case purports to rest on an analysis of the use of interrogatories in pre-1938 habeas corpus and pre-1938 ordinary civil proceedings. As Petitioner's opening brief noted, there is no warrant in the language of Rule 81(a) either for requiring a showing that the *specific procedure* sought to be employed was used in habeas corpus and other civil proceedings prior to 1938 or for requiring a comparison between the use of that *specific procedure* in pre-1938 habeas corpus and its use in other civil proceedings; such a showing and comparison was not required in the many federal cases which have heretofore permitted use of the Rules. Petitioner also pointed out that such an application of Rule 81(a)(2) would automatically exclude any procedural *advance* included in the Rules from use in habeas corpus because, by definition, such an advance could not have been used prior to enactment of the Rules. (Pet. Brief, pp. 30-31)

Respondent does not come to grips with the statutory language. His contentions that *Hunter* v. *Thomas,* 173 F.2d 810 (10th Cir. 1949) requires an analysis of specific procedures employed in habeas corpus prior to 1938 (Resp. Brief, pp. 59, 71-72) and that the other federal decisions cited by Petitioner are nothing more than "mutant progeny" of *Hunter* v. *Thomas* (p. 71) are based upon a misreading of those cases. In the *Hunter* case, the issue was whether the provisions in Rule 59 with regard to new trials in cases tried without a jury applied to habeas corpus proceedings. The court held that they did. This holding, however, was not based on the existence of a pre-1938 precedent for use of this specific procedure in habeas corpus; contrary to Respondent's assertion, *Tiberg* v. *Warren,* 192 Fed. 458, 462-463 (9th Cir. 1911), did not furnish such precedent. (That case did not involve "new trial" procedures at all because there was apparently no prior trial of fact; although the opinion is somewhat opaque, it appears that the petitioner had initially been discharged on the pleadings.) The holding in *Hunter* v. *Thomas* was instead based on the court's finding that the new trial provisions of Rule 59 were as appropriate for habeas corpus as for other "cases tried without a jury" because the practice in habeas corpus was that of a "civil proceeding" affording "a legal, not an equitable remedy." The decisions in *Bowdidge* v. *Lehman,* 252 F.2d 366 (6th Cir. 1958), *United States ex rel. Seals* v. *Wiman,* 304 F.2d 53 (5th Cir. 1962) *cert. denied,* 372 U.S. 915 (1963) and *Abel* v. *Tinsley,* 338 F.2d 514 (10th Cir. 1964), applying other Civil Rules, were predicated on the same type of analysis. While these cases cited *Hunter* v. *Thomas,* they are, as they should be, the "progeny" of the language of Rule 81(a)(2).

Respondent seeks to justify freezing habeas corpus procedures in their pre-1938 form by arguing that since this Court in *Miner* v. *Atlass*, 363 U.S. 641 (1960) "has recognized the discovery practice as a substantial innovation tantamount to a substantive right, it cannot be extended to a class of actions to which the Rules did not apply." (Resp. Brief, p. 61, n. 35). The argument is patently circuitous, assuming as it does that the Rules do not apply. Moreover, it is based on a misreading of *Miner* v. *Atlass*. The passage from that case which Respondent cites, and the entire decision itself, is concerned not with "discovery" in general, but with "discovery by deposition" which the Court stated was "at once more weighty and more complex" than other procedures. Discovery by deposition is not at issue here. Discovery interrogatories are, and as stated above, by 1938 they could scarcely be regarded as a "substantial innovation."

In sum, there is nothing in the language of Rule 81(a)(2) or prior decisions either of this Court or the Courts of Appeal to suggest that only those specific procedures in the Federal Rules which were used in habeas corpus prior to 1938 are now available in habeas corpus. However, even if Rule 81(a)(2) had so frozen habeas corpus procedures, Petitioner would not be precluded from a use of discovery interrogatories. Since, as even Respondent concedes, "habeas corpus has always been considered a civil proceeding" (Resp. Brief, p. 65), there is no reason to believe that discovery interrogatories were not used pursuant to Equity Rule 58 in habeas corpus prior to enactment of the Rules. The "reasons" for a contrary belief which are advanced in Respondent's brief are ill-founded.

Respondent first points to a dearth of decisional and textual law as evidence that discovery interrogatories were not employed but, as Petitioner's opening brief pointed out (Pet. Brief, p. 33), this silence is as indicative that the procedure was used without controversy as that it was not used at all. It is inconceivable that the framers of Rule 81(a)(2) intended that the availability of a Rule would depend upon the chance that its counterpart in habeas corpus prior to the adoption of the Rules would be reported. There is certainly nothing in the language of Rule 81(a)(2) to support such a notion.

Second, Respondent argues that habeas corpus "was administered by courts of law rather than courts of equity" so that "the equity rules providing discovery did not apply to federal habeas proceedings." (Resp. Brief, p. 65). However, Respondent elsewhere concedes that it is not at all clear that habeas corpus was not a species of equitable proceeding. (Resp. Brief, p. 65, n. 41). And, as was pointed out in Petitioner's opening brief, an equity suit could be initiated simply to obtain discovery by way of interrogatories in aid of an action at law so that this discovery device was available in civil actions generally, whether legal or equitable. (Pet. Brief, p. 32). See Moore and Garfinkel, 4 *Moore's Federal Practice*, pp. 2261-62 (2d ed. 1966). Thus, whether habeas corpus was technically a "legal" or "equitable" action is irrelevant insofar as the availability of interrogatories was concerned.

Third, Respondent contends that Equity Rule 58 was nothing more than the old chancery bill of discovery, and that since the old bill "was not entertained where the controversy involved 'moral turpitude' or arose 'from acts clearly immoral,'" Equity Rule 58 could not have been

employed in habeas corpus proceedings. (Resp. Brief, p. 66, n. 43, 67). In fact, however, Rule 58 was *not* treated simply as the successor to the old chancery bill of discovery, at least insofar as limitations on its use were concerned. As was stated in *Quirk* v. *Quirk*, 259 Fed. 597, 598 (S.D.Cal. 1919):

> "The old rules are abolished. There is no reason why the procedure now should be hampered by restrictions imposed by any previous rules or procedure."

Accord: *Bankers Util. Co.* v. *David H. Zell, Inc.*, 15 F. Supp. 1072 (S.D.N.Y. 1936); *Perkins Oil Well Cementing Co.* v. *Owen*, 293 Fed. 759 (S.D.Cal. 1923).

And, in any event, habeas corpus proceedings have always been concerned not with "immoral acts" or "acts of moral turpitude," but with the process by which a petitioner has been tried and convicted.

Respondent also contends that since Equity Rule 58 interrogatories could only have been propounded to a "party", they would have been useless to a habeas corpus petitioner for he could only propound them to a warden who would know nothing except the fact of the Petitioner's detention (Resp. Brief, p. 68). However, under Equity Rule 58, as under Rule 33, interrogatories propounded to the representative of a real party in interest, such as the officer of a corporation or the warden as representative of the State, were required to be answered on the basis of the knowledge of not only that representative, but also of the other agents of the real party in interest. See *General Electric Co.* v. *Independent Lamp & Wire Co.*, 244 Fed. 825, 826 (D.N.J. 1915); *Cleminshaw* v. *Beech Aircraft Corp.*, 21 FRD 300 (D.Del. 1957). Thus, interroga-

tories propounded to a warden prior to 1938 could well yield information valuable to a petitioner. Moreover, even if Respondent were correct in his assertion that interrogatories would have been valueless to a petitioner, the same assertion certainly could not be made with respect to the value to the State of interrogatories propounded to a *petitioner*. In sum, discovery interrogatories would have been—and in all probability were—just as valuable a tool in pre-1938 habeas corpus practice as they were in other civil proceedings.

Finally, wholly aside from the technical construction of the language of Rule 81(a)(2), there are many vital policy considerations in favor of making Rule 33, and other appropriate Federal Rules, available in habeas corpus proceedings. These considerations are presented in the *Amici* brief of the NAACP *et al.*, and without repeating them here, Petitioner joins with Amici in urging them upon the Court.

Conclusion

For the reasons stated, petitioner renews its prayer that the decision of the Court of Appeals be reversed, that its writ of mandamus and/or prohibition be quashed, and that the order of the District Court denying the objections of Respondent to petitioner Walker's interrogatories and compelling answers thereto be reinstated.

Respectfully submitted,

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